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In the Supreme Court of the United States

October Term, 1954.

No. 320 FILED NOV 8 1954

MICHIGN-WISCONSIN PIPE LINE COMPANY,
Appellant,
vs.
THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, *ET AL.*, *Appellees.*

No. 321 FILED NOV 8 1954

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant,
vs.
THE CORPORATION COMMISSION OF THE STATE OF OLKAHOMA, *ET AL.*, *Appellees.*

No. 322 FILED SEP 16 1954

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,
vs.
THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, *ET AL.*, *Appellees.*

Appeals from the Supreme Court of the State of Oklahoma.

MOTION OF APPELLEE PHILLIPS PETROLEUM COMPANY TO DISMISS.

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Appeals from the Supreme Court of the State of Oklahoma.

MOTION OF APPELLEE PHILLIPS PETROLEUM COMPANY TO DISMISS.

Appellee Phillips Petroleum Company, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal in each of the above entitled cases on the grounds

(*a*) that the appeals do not present a substantial federal question and (*b*) that in part the federal questions sought to be raised were not timely or properly raised or expressly passed on by the court below.

Statement of Case.

The three cases under consideration are companion appeals[1] from a final judgment and decision of the Supreme Court of the State of Oklahoma[2] sustaining an order of the Corporation Commission of Oklahoma[3] increasing from 7c to 9.8262c per thousand cubic feet the minimum wellhead price or its equivalent a producer must realize as a condition *to the production of gas* in the Guymon-Hugoton Field in Oklahoma.

The Commission in entering the 7c order[4] found that to prevent waste protect the interest of the public and of those having a right to produce from the Guymon-Hugoton Field it was necessary that the producers realize for the gas a minimum of 7c per thousand cubic feet at the wellhead. The order provided "That no natural gas shall be taken out of the producing structures or formations * * * at a price, at the wellhead, of less than 7c per thousand cubic feet * * *." The question immediately arose as to those producers that do not sell their gas at the wellhead but first gather and process the same and then sell or otherwise utilize the resi-

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1. Although filed as separate appeals, the appellants in cases Nos. 320 and 321 have filed a joint Statement as to Jurisdiction in the two appeals. Appellant in case No. 322, although filing a separate Statement as to Jurisdiction, raises substantially the same questions. All three are presented on a single record. Appellees, The Corporation Commission of Oklahoma and Certain Mineral Owners in Texas County, Oklahoma, have filed their motion to dismiss the appeals or affirm the judgment as a single instrument in the three cases.

2. Entered April 27, 1954. Rehearing denied July 13, 1954. Not yet officially reported but printed in Vol. 25 of The Journal of the Oklahoma Bar Association at page 831. Copy appears as Apepndix A to each of appellants' Statement as to Jurisdiction.

3. Order No. 26096 dated July 29, 1952, and effective August 1, 1952. Copy appears as Appendix B to each of appellants' Statements as to Jurisdiction.

4. Order No. 19514 in Cause CD No. 1054, dated December 9, 1946, effective January 1, 1947.

due elsewhere than at the wellhead. Interpreting the order in such respect, the Commission entered a supplemental order[5] finding that under such circumstances the producer must "realize therefrom *the equivalent* of 7c per thousand cubic feet at the wellhead."

Both the basic 7c order and the supplemental order were before this Court on appeal and sustained in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Co.* v. *State of Oklahoma*, 340 U. S. 190. The evidence upon which the orders were based is summarized in the opinions of this Court in those cases. The Court there considered the fact that 90 per cent of the gas moved interstate and the effect of the orders on the sale price thereof. Included and considered were the identical oprations and sale by appellee Phillips Petroleum Company to appellant Panhandle Eastern Pipe Line Company of the residue gas involved in the appeals here under consideration. Also considered was the question of the validity of the orders under the Due Process and Contract Impairment clauses of the United States Constitution.

Appellants did not below and do not here question the validity of the 7c order nor the decision of this Court sustaining the same. Instead, they misinterpret and treat the 9.8262c order and its legal effect as different from the 7c order and proceed to reargue all of the questions decided by this Court in respect to the 7c order.

In entering the 9.8262c order involved in these appeals, the Commission found:

> "6. That since the Commission issued its Order No. 19514, the general increase in commodity prices and the use value of gas have increased throughout the Guymon-Hugoton Field and elsewhere to the point that the production and sale of said gas from said field at any price less than 9.8262c measured at the wellhead at a pressure base of 14.65 pounds absolute per square

5. Order No. 19702 in Cause CD No. 1054, dated February 4, 1947.

inch, constitutes and causes waste, both physical and economic.

"7. That the taking of natural gas from the Guymon-Hugoton Field at prices and under terms and measurement now prevalent in said field results in and causes:

a. Economic waste of a great natural resource, to-wit: natural gas;
b. Actual physical waste of natural gas;
c. Loss to the royalty owners in said field;
d. Loss to the State of Oklahoma in revenues in the form of gross production taxes;
e. Inequitable taking of natural gas from the common source of supply involved;
f. Discrimination against various producers in the field.

"8. • • •

"9. That the conditions which existed in the Guymon-Hugoton Field after it issued its Order No. 19514 have generally continued to prevail within said field, except that the price of 7c for gas therefrom is no longer adequate to prevent waste and protect the correlative rights of the parties therein and insure the development of and production from all of said common sources of supply during the time that facilities for the transportation from said Field to the market will be available.

"10. • • •

"11. That only a small portion of the gas produced in said Field is actually sold or delivered at the wellhead and in all those instances where such sale and delivery does not occur at the wellhead, it will be necessary for the producer to determine whether or not it is realizing the equivalent of the minimum price fixed by this order; that much of the gas which is not sold at the wellhead is processed by the producer for the ex-

traction of liquid hydrocarbons and the residue then sold during or at the conclusion of gathering; that such processing and sale during or at the conclusion of gathering constitutes the performance of a valuable service to the purchaser, in that said processing conditions said gas for pipe line transmission, often including dehydration or desulphurization or both, and that the residue from numerous wells is delivered at a central point, thus eliminating the necessity for the purchaser to make substantial investments and incur substantial expenses in gathering said gas; that the liquid hydrocarbons extracted by said processing are of value to the producer but that such value fluctuates from time to time depending upon competitive conditions not within the control of such producer; that, on the average and considering the fluctuations in value of said liquid hydrocarbons, the value realized by such producer from the sale or use of said liquid hydrocarbon does not exceed the cost of gathering and processing said gas, including a reasonable allowance for depreciation and return on investment; and that such producer, to realize a price for such gas equivalent to and not less than 9.8262 cents per thousand cubic feet at the wellhead, must receive for such processed gas a price of not less than 9.8262 cents per thousand cubic feet measured at a pressure base of 14.65 psia at a temperature of 60° F.

"12. That residue gas containing 950 BTU per cubic foot saturated with water at standard conditions has a value for normal uses equal to that of the average gas produced from the Guymon-Hugoton field, but that residue gas having less than 950 BTU per subic foot saturated with water at standard conditions does not have a value for normal uses equal to that of the average gas produced from the Guymon-Hugoton field and that, therefore, if such residue gas contains less than 950 BTU per cubic foot saturated with water at standard conditions, the minimum price for such resi-

due gas should be in the proportion that the BTU content of such gas bears to 950 BTU per cubic foot.

"13. That for the purpose of preventing waste, economic and physical, of natural gas, for the purpose of protecting correlative rights, and to insure the greatest ultimate recovery of natural gas from the reservoir involved, this Commission should not permit natural gas to be taken out of the producing formations in the Guymon-Hugoton Field, at a price less than 9.8262c per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch.

"14. That a minimum price order cannot be made fully effective and discrimination prevented without a means provided for determining the manner in which the amount realized for gas by producers operating gathering and processing plants."[6]

The Supreme Court of Oklahoma in the decision herein appealed from summarized the evidence supporting such findings and said, "The findings of the Commission are supported by basic facts and the order of the Commission is based on substantial evidence." Such evidence was uncontradicted. The only evidence offered by the appellants herein was as to the volume of gas moving interstate, a fact known and referred to by this Court in the appeals from the 7c order. Based on such findings and evidence, the Commission entered the 9.8262c order, in part providing as follows:

"It Is Therefore Ordered by the Corporation Commission of the State of Oklahoma as follows:

"1. That no gas shall be produced from any well located in the Guymon-Hugoton Field of Oklahoma except at a price of not less than 9.8262c per thousand

6. Finding 14 is obviously an incomplete statement. It can only mean that the minimum price order cannot be made fully effective and discrimination prevented without a means provided for determining whether the amounts realized by producers gathering and processing their own produced gas before selling it is equivalent to the wellhead price.

cubic feet if sold at the wellhead or on the lease or drilling units from which produced, or a price equivalent to not less than 9.8262c per thousand cubic feet at the wellhead if sold off the lease or drilling unit or otherwise utilized. If the gas is sold during or upon conclusion of gathering without being processed for the extraction of liquid hydrocarbons, the price shall be not less than 9.8262c per thousand cubic feet plus the reasonable cost of gathering. If the gas is processed for extraction of liquid hydrocarbons and sold during or at the conclusion of gathering, the price for the residue gas shall be not less than 9.8262c per thousand cubic feet."

Appellee Phillips Petroleum Company is a substantial producer of gas in the Guymon-Hugoton Field, which is a part of a much larger common source of supply or gas field extending into Texas on the south where appellee is also a producer of gas. Appellee does not sell its gas at the wellhead but first gathers and processes the same for removal of the liquid hydrocarbons present in the gas and then sells the residue for delivery at the exhaust of the processing plants. The residue is in part sold to appellant Panhandle Eastern Pipe Line Company and in part to appellant Michigan-Wisconsin Pipe Line Company under long-term contracts which, for the terms of the contracts, dedicate the production from designated acreage to such contracts. The processing and delivery of the residue gas happens to occur across the state line in Texas merely because of the location of the processing plants. The plants are where they are because of being centrally located in respect to Phillips' leases and gathering operations in both the Oklahoma and Texas portions of the field. The presence of the state line is a mere coincidence.

The interests of the appellants Panhandle Eastern Pipe Line Company and Michigan-Wisconsin Pipe Line Company in these appeals grow out of the aforesaid gas purchase contracts with appellee Phillips Petroleum Company.

The facts pertaining to the interests and relationships of appellee Phillips Petroleum Company and appellants Panhandle Eastern Pipe Line Company and Michigan-Wisconsin Pipe Line Company and the position of appellee Phillips Petroleum Company with reference to the minimum price order under consideration are more fully stated in an opening statement made by Phillips Petroleum Company at the hearing before the Commission, a copy of which is attached hereto as Appendix A. The same facts, except for the deliveries of gas to appellant Michigan-Wisconsin Pipe Line Company which had not then been commenced, were before this Court in the cases of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.* 340 U. S. 179, and *Phillips Petroleum Company* v. *State of Oklahoma,* 340 U. S. 190.

The facts pertaining to and the interest of appellant Natural Gas Pipeline Company of America are substantially the same as the facts pertaining to and the interests of appellants Panhandle Eastern Pipe Line Company and Michigan-Wisconsin Pipe Line Company, except that appellant Natural Gas Pipeline Company of America has a gas purchase contract for the purchase of gas from a producer in the Guymon-Hugoton Field by the name of Panoma Corporation which, like appellee Phillips Petroleum Company, gathers and processes the gas and makes delivery of the residue to Natural Gas Pipeline Company of America after processing, and except for the fact that the processing plant of Panoma Corporation happens to be in Oklahoma and the resulting delivery of the residue gas occurs in Oklahoma.

Appellee Phillips Petroleum Company has never at any time applied for or sponsored the making of the minimum gas price orders by the Corporation Commission of Oklahoma, but in connection with the making of the 9.8262c order here under consideration advocated before the Commission that if it made such an order that it be so written as to apply reasonably and with clarity to producers of gas who did not sell their gas at the wellhead.

Appellants, as a basis for their objections to the 9.8262c order and their claim that the questions presented are different from those decided by this Court in respect to the 7c order, misconstrue the order as one directly regulating the sale, as such, of the gas as distinguished from a *regulation of production* conditioned on what the producer must realize for the gas at or as related back to the wellhead. In so doing they regard the second and third sentences of paragraph 1 of the order, quoted above, as being separate isolated orders regulating different types of sales without relation to the regulation of production. They completely ignore the fact that the second and third sentences, standing alone, are meaningless and can be given meaning only when read in conjunction with the first sentence and the findings upon which the order is based.

The 9.8262c order in language, purpose and effect does nothing more than and is no different from the 7c order, as interpreted by supplemental Order No. 19702, and sustained by this Court, except (*1*) it increases the minimum wellhead price or its equivalent a producer must realize as a condition to production and (*2*) it gives to producers who do not sell at the wellhead a means, without guessing or without a complex accounting problem, of determining when they are receiving a price equivalent to the prescribed minimum wellhead price. It is nonetheless a production order which, for the prevention of waste, the protection of the interests of the public and of those having the right to produce from the Guymon-Hugoton Field, prescribes the minimum wellhead price or its equivalent a producer must realize for the gas as a condition to its production. The second and third sentences of paragraph 1 of the order are merly supplemental to the first sentence and spell out and for clarity define what is required to constitute the equivalent of the wellhead price under certain named conditions prevalent in the field where the gas is not sold at the wellhead. The Commission in support of Finding No. 11 of the order, above quoted, on the basis of the uncontradicted evidence in the record, found that a producer who first gathers and proc-

esses the gas and then sells the residue, to realize a price for such gas equivalent to 9.8262c per thousand cubic feet at the wellhead, must receive for the processed gas a price of not less than 9.8262c per thousand cubic feet.

All are agreed that under the decisions of the Oklahoma Supreme Court and this Court in the *Cities Service* and *Phillips* cases, *supra,* the State of Oklahoma, acting through the Corporation Commission, has the authority to prescribe the minimum price *a producer must realize* as a condition to production of the gas, even though the gas when produced moves directly in interestate commerce. The regulation is of the production, not of the sale. It would be absurd to say that the State has such power where the amount realized results from a sale at the wellhead but that the power does not exist if the gas is utilized or sold by the producer elsewhere than at the wellhead. The State is still interested in what the producer realizes. If the Corporation Commission in this instance could make no requirement as to the price realized by the producer after gathering or processing as a condition to the production of the gas, the Commission would have no control over the production of gas by producers of 88 per cent of the gas in the field who do not sell their gas at the wellhead.[7] Yet this Court in the case of *Phillips Petroleum Co.* v. *State of Oklahoma,* 340 U. S. 190, in respect to this very problem, said, "In a field which constitutes a common reservoir of gas, the Commission must be able to regulate the operations of all producers or there is little point in regulating any." This is the basis of the decision of the Supreme Court of Oklahoma herein appealed from. In such respect the court determined, based upon a review by it of the evidence, that "the formula and method established is both reasonable and practical."

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7. The evidence before the Commission and in the record in this case discloses that only 12 per cent of the production in the Guymon-Hugoton Field is sold at the wellhead.

The Federal Questions Presented Are Not Substantial.

Briefly stated, the questions presented by appellants are whether:

1. The order violates the Commerce clause of the Federal Constitution.
2. The order as applied to residue gas delivered to appellants Michigan-Wisconsin Pipe Line Company and Panhandle Eastern Pipe Line Company in Texas is extraterritorial, in violation of the Due Process clause of the Federal Constitution.
3. The order arbitrarily takes property and impairs the obligation of a contract for no public purpose, in violation of the Due Process and Contract Impairment clauses of the Federal Constitution.
4. The order is incompatible with the jurisdiction of the Federal Power Commission under the Natural Gas Act.[8]

All of the questions so raised, except the question with respect to the Natural Gas Act, were conclusively settled by this Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Co.* v. *State of Oklahoma*, 340 U. S. 190. None presents a substantial federal question. Mr. Justice BLACK, in the *Cities Service* and *Phillips* cases, regarded such questions as being "frivolous."

As will be later discussed, the question with respect to the Natural Gas Act was not raised in or passed on by the court below.

I. *The order does not violate the Commerce clause of the Federal Constitution.*

In respect to its purposes and its effect on interstate commerce, the 9.8262c order is no different whatever from the 7c order. Both were made under authority of the same

8. Raised only by appellants Michigan-Wisconsin Pipe Line Company and Natural Gas Pipeline Company of America.

statute and for the same *identical* purpose. Both prescribe a minimum price *the producers must realize* for the gas *as a condition to its production.* Any refinement of language as to the determination of whether a price received elsewhere than at the wellhead or on the lease where produced is quivalent to the wellhead or lease price does not alter the effect of the order on commerce. Prescribing what that price shall be if the gas is first sold as residue places no more burden nor does it constitute any more of an embargo on interstate commerce than does the fixing of a minimum price at the wellhead. In either instance the producer is prohibited from producing the gas unless a prescribed price is realized.

Thus, what was said by this Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Co.* v. *State of Oklahoma,* 340 U. S. 190, in regard to the validity of the 7c order under the Commerce clause of the Federal Constitution is equally applicable and conclusive in this case and leaves no room for further argument.

Appellants rely strongly upon the decisions of this Court in *Phillips Petroleum Co.* v. *State of Wisconsin,* 347 U. S. 672, and *Panhandle Eastern Pipe Line Co.* v. *Calvert,* 347 U. S. 157. Both cases hold that the sales and movement of the gas here involved are in interstate commerce. That fact, however, has never been questioned and was expressly recognized by this Court in the *Cities Service* case and the case of *Phillips Petroleum Co.* v. *State of Oklahoma.* This Court in the case of *Phillips Petroleum Co.* v. *State of Wisconsin,* in referring to the *Cities Service* case and the case of *Phillips Petroleum Co.* v. *State of Oklahoma,* said, "Those cases upheld as constitutional state minimum price orders, justified as conservation measures, *applying to sales of natural gas in interstate commerce.*"

Although thus alluding to the *Cities Service* case and the case of *Phillips Petroleum Co.* v. *State of Oklahoma,* this Court in *Phillips Petroleum Co.* v. *State of Wisconsin* did not in any way overrule or modify the decision therein

reached as to the Oklahoma minimum price orders, especially in the absence of a conflicting federal regulation. The absence of any conflicting federal regulation will be discussed under subhead IV relating to the order as affected by the Natural Gas Act.

In the case of *Panhandle Eastern Pipe Line Co.* v. *Calvert,* this Court merely held that the incidence of the Texas gas gathering tax there involved was upon the movement of the gas in interstate commerce after production and gathering had ceased, and hence was a direct tax and an unlawful burden on interstate commerce. It had nothing to do with the regulation by the State of Texas of the producer or the production of the gas in the interest of conservation.

II. *The order as it may affect the price of residue gas delivered in Texas is not extraterritorial.*

Although the order may affect the sale of the gas outside the state, it is not a regulation thereof. It is a regulation of the producer and the production of the gas in Oklahoma dependent upon what the producer realizes therefor. The order looks to sales at the end of gathering even though outside the state and the price there received only to determine whether the producer is realizing a price or its equivalent found necessary to prevent waste, protect the interest of the public and of those having a right to produce from the common source of supply, matters of legitimate local concern.

If, as was held by this Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U. S. 179, and *Phillips Petroleum Co.* v. *State of Oklahoma,* 340 U. S. 190, the State of Oklahoma has an interest in what a producer realizes for the gas as a condition to production, that interest extends to the price realized by the producer therefrom whether at the wellhead or at the end of gathering regardless of state lines. If this were not true, a producer could set at naught the public policy of Oklahoma merely by taking the gas outside the state before selling it.

As was said by this Court in *Osborn* v. *Ozlin,* (1940) 310 U. S. 53, 62:

> "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."

In the *Cities Service* and *Phillips* cases, *supra,* this Court has held that the fixing of the minimum price that a producer must realize for the gas as a condition to production is not within that domain which the Constitution forbids.

In the case of *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* (1937) 301 U. S. 412, 427, this Court said:

> "The appellants, by incorporating in some other state, or by spreading their business and activities over other states, cannot set at naught the public policy of Louisiana."

Other cases by this Court holding that the regulation or taxation of activities, if proper within a state, are not invalid as extraterritorial merely because of their effect upon or their being affected by matters or events occurring outside the state, are *American Manufacturing Co.* v. *St. Louis,* (1919) 250 U. S. 459; *Utah Power & Light Co.* v. *Pfost,* (1932) 286 U. S. 165; *Nelson* v. *Sears, Roebuck & Co.,* (1941) 312 U. S. 359; *International Harvester Co.* v. *Evat,* (1947) 329 U. S. 416; *Wisconsin* v. *J. C. Penney Co.,* (1940) 311 U. S. 435; *Wisconsin* v. *Minnesota Mining & Manufacturing Co.,* (1940) 311 U. S. 452; *International Harvester Co.* v. *Wisconsin Dept. of Taxation,* (1944) 322 U. S. 435; *Aponaug Mfg. Co.* v. *State Tax Commission,* (1941) 190 Miss. 805, 1 So. (2d) 763; *Maine* v. *Grand Trunk Ry. Co.,* (1891) 142 U. S. 217; *Ford Motor Co.* v. *Beauchamp,* (1939) 308 U. S. 331.

In fact, the validity of the Oklahoma minimum price orders on this score, although not expressly mentioned, was effectively decided in the *Cities Service* case and the case of

Phillips Petroleum Co. v. *State of Oklahoma, supra,* in that the very same sale of residue gas in Texas by appellee Phillips Petroleum Company to appellant Panhandle Eastern Pipe Line Company here involved was before this Court in those cases wherein the 7c order was held valid. In the *Phillips* case the Court in respect to such sale said, "In a field which constitutes a common reservoir of gas, the Commission must be able to regulate the operations of all producers or there is little point in regulating any."

III. *The order does not arbitrarily take property or impair the obligation of contracts for no public purpose, in violation of the Due Process and Contract Impairment clauses of the Federal Constitution.*

Everything said by the appellants in their Statements as to Jurisdiction in this regard was considered and decided by this Court in the cases of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U. S. 179, and *Phillips Petroleum Co.* v. *State of Oklahoma,* 340 U. S. 190. There this Court expressly held that it was within the police power of the state to prescribe the minimum price or its equivalent the producer must realize as a condition to the production of gas in the State of Oklahoma. So far as its effect upon property and contract rights is concerned, the only difference between the 9.8262c order here involved and the 7c order involved in those cases is the increase in the minimum price from 7c to 9.8262c per thousand cubic feet. Such increase is amply supported and justified under the evidence and the findings by the Commission. The evidence was reviewed by the Supreme Court of Oklahoma and found to be sufficient. In fact, as before stated, the evidence in this regard was uncontradicted.

IV. *The order is not invalid as being in conflict with the Natural Gas Act or any existing regulation thereunder.*

Although this question was not raised in or passed on by the court below, as will be later discussed, we will briefly

point out that no substantial federal question exists in respect thereof.

This Court in *Phillips Petroleum Co.* v. *State of Wisconsin,* 347 U. S. 672, (pending on petitions for rehearing) held that sales of gas for resale in interstate commerce by producers and gatherers are subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. The Court, however, did not in that case in any way take from or limit the recognized jurisdiction and authority of the states to regulate the physical production of gas in the interest of conservation or of any other consideration of legitimate local concern.

As recognized by this Court in the cases of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U. S. 179, and *Phillips Petroleum Co.* v. *State of Oklahoma,* 340 U. S. 190, the Oklahoma minimum gas price orders constitute an authorized regulation of production by the state. Although the orders may affect the price of the gas, they are a regulation of production and not a regulation of the sale.

Being a valid regulation of production by the state, then under Section 1b of the Natural Gas Act and under the holding of this Court in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498; *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, it is unaffected by the Natural Gas Act or any regulation of the Federal Power Commission thereunder.

This is particularly true in the absence of any conflicting regulation by the Federal Power Commission under the Natural Gas Act, as is presently the case. There is in effect no order or regulation by the Federal Power Commission which would indicate that it will not allow producers and purchasers of gas affected by the 9.8262c minimum price order to include in their rate base the minimum price so prescribed by such order.

Counsel for appellants Michigan-Wisconsin Pipe Line Company and Natural Gas Pipeline Company of America in endeavoring to establish some basis for conflict between the actions of the Federal Power Commission and the Oklahoma price order referred in their Statement as to Jurisdiction (p. 10) to a portion of the order of the Federal Power Commission issued July 30, 1954, in Michigan-Wisconsin's rate case, *In the Matter of Michigan Wisconsin Pipe Line Company,* Opinion No. 275. The language of the order referred to was, however, soon corrected and clarified by the Federal Power Commission so that the exact opposite of the situation asserted by counsel for appellants is now the case. On August 17, 1954, the Commission issued an order entitled "Clarification of Statements in Opinion No. 275" wherein the Commission expressly allowed Michigan-Wisconsin to consider as a part of its cost of service in determining its rate base the minimum wellhead price on all gas produced in Oklahoma by Phillips and delivered to Michigan-Wisconsin.[9]

Also, in its opinion and order in *In the Matter of Panhandle Eastern Pipe Line Company,* Dockets Nos. G-1116, G-1240, G-1317, G-1344, G-1417, G-1725, G-1754 and G-2101, issued April 15, 1954, the Federal Power Commission allowed to appellant Panhandle Eastern Pipe Line Company, as a part of its rate base, the weighted average purchase price of gas, which in respect to the Guyman-Hugoton Field in Oklahoma had for its minimum the 9.8262c price prescribed by the Oklahoma minimum price order.

Hence it is that presently there is no conflict between

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9. In its "Clarification of Statements in Opinion No. 275" adopted August 12, 1954, and issued August 17, 1954, Docket Nos. G-1678 and G-1996, the Commission quoted language from its Opinion No. 275 (including the language alluded to by counsel for appellants here in their statement of jurisdiction) and then said:

> "The Commission hereby corrects and clarifies these statements. On the basis of the record in this docket the Oklahoma minimum well-head price on the entire 6,161,368 Mcf of natural gas produced in the State of Oklahoma, during the test period, and delivered by Phillips to Michigan-Wisconsin represents costs which may be properly considered in determining Michigan-Wisconsin's cost of service."

the Natural Gas Act or any regulation of the Federal Power Commission thereunder and the minimum price order here involved. Until there is such a conflict, no substantial federal question exists.

Appellants Michigan-Wisconsin Pipe Line Company and Natural Gas Pipeline Company of America at page 14 of their Statement as to Jurisdiction in Cases Nos. 320 and 321 make this statement:

> "It should be noted, in this connection, that the Federal Power Commission, by its Order No. 174 issued July 16, 1954, has forbidden Phillips and other companies which sell gas to interstate pipeline companies from suspending any service provided by such sellers on June 7, 1954, without the approval of the Federal Power Commission. Thus, any attempt by Oklahoma to enforce its prohibition of production would squarely contravene the Federal Power Commission's order. Under the Natural Gas Act as under the Commerce Clause itself, therefore, a state may not attempt to prohibit or embargo the production of gas as a means of enforcing payment of a state-fixed price for interstate sales."

The enforcement by the State of Oklahoma of any conservation regulation having for its purpose the regulation or restriction of production in the interest of conservation or other legitimate local purpose would have the same effect in respect to gas moving in interstate commerce. To say that such effect denies to the state the power to so regulate production is to strip the state of all power to regulate production, contrary to the express provisions of the Natural Gas Act and contrary to the express holding by this Court in the cases of *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, *Interstate Natural Gas Co.* v. *Federal Power Commission*, and *Federal Power Commission* v. *Hope Natural Gas Co.*, *supra*. As was said by this Court in the *Interstate* case:

"Clearly, among the powers thus reserved to the states is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the states full freedom in these matters."

This Court in the *Panhandle Eastern* case, *supra*, said:

"The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states."

Until, however, as before stated, such a conflict exists, no substantial federal question is presented.

Question of Conflict with Jurisdiction of Federal Power Commission Under the Natural Gas Act Not Raised in or Decided by the Court Below.

Although appellants at page 30 of their petition for rehearing and supporting brief in the court below briefly allude to the case of *State of Wisconsin* v. *Federal Power Commission*, 205 F. (2d) 706, dealing with the jurisdiction of the Federal Power Commission over sales of gas, they do so only as establishing that the sales here involved are in interstate commerce and that hence the minimum price order violates the Commerce clause of the Constitution. Nowhere in their assignments of error in the Supreme Court of Oklahoma nor in their briefs nor in said petition for rehearing do appellants in any way raise the question or discuss the validity of the 9.8262c minimum price order as it relates to the Natural Gas Act or the jurisdiction of the Federal Power Commission thereunder. Nor is the question decided or in any way referred to by the Oklahoma Supreme Court in its opinion in these cases. The question is raised by appellants Michigan-Wisconsin Pipe Line Company and Natural Gas Pipeline Company of America for

the first time in this Court. Therefore no substantial federal question is raised.

We respectfully submit, therefore, that the appellants present no substantial federal question for the decision of this Court and that the appeals should be dismissed.

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APPENDIX A.

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA.

In the Matter of the Application of Certain Mineral Owners in Texas County, Oklahoma, for an Order Determining the Minimum Price at Which Gas Produced from the Guymon-Hugoton Field May Be First Purchased or Sold.—Cause CD No. 3628; Order No. 26096.

OPENING STATEMENT OF PHILLIPS PETROLEUM COMPANY AT THE HEARING BEFORE THE OKLAHOMA CORPORATION COMMISSION ON THE 9.8262c ORDER.

"Without being understood as supporting the proposed increase of the minimum price of gas in the Guymon-Hugoton Field and without waiving the right to object thereto under the evidence in this proceeding, Phillips Petroleum Company proposes to introduce evidence and show to the Commission the facts and circumstances pertaining to its operations and to urge that if an order is written increasing the minimum price that it be so written as to apply reasonably and with clarity to producers and gatherers of gas in the position of Phillips.

"Phillips in respect to its operations in the Guymon-Hugoton Field, is primarily a producer of gas from its own wells and leases. It does not sell its gas at the wellhead but by means of its own gathering lines and gasoline plants gathers and processes the same for the removal of the liquid hydrocarbons present in the gas and then sells the residue gas for delivery at the exhaust of the plants. In addition, Phillips has made contracts with certain other producers for the purchase of their gas, which it thus gathers, processes and handles in the same manner as it does its own produced gas.

"The size and extent of its operations are evidenced by the fact that Phillips in the Guymon-Hugoton Field owns oil and gas leases on approximately 173,000 acres of land

on which it has drilled and is operating 198 wells having a daily average production during February 1952 of approximately 72 million cubic feet of gas. It has contracts for the purchase of gas from approximately 75,000 additional acres of land on which other producers have drilled and are operating 61 wells having a dairly average production during the same period of approximately 23 million cubic feet of gas. The production from its own leases was 14 per cent of the total production of the field. The gas so purchased was 4.4 per cent of the field total. Taken together the volume of gas so produced and purchased by Phillips was 18.4 per cent of the total field production.

"The gasoline plants and points of sale and delivery of the residue gas to which reference is made, although located in Texas a few hundred yards south of the Oklahoma-Texas state line and hence technically outside the so-called Guymon-Hugoton Field, are nonetheless in the same field from which the gas is produced and gathered. The name 'Guymon-Hugoton Field' is of course but the designation by this Commission of the Oklahoma portion of the much larger common source of supply or gas field extending into Kansas on the north and Texas on the south. Phillips also has leases on a large amount of land in the Texas portion of the field from which it gathers gas along with additional gas purchased from other producers, which is likewise processed in the same plants and the residue is sold to the same purchasers. So far as the physical character of the field and its operations is concerned, the presence of the state line is but a mere coincidence. The plants are where they are and the residue is there sold merely because of being centrally located in respect to Phillips' leases and gathering operations in both the Oklahoma and Texas portions of the field.

"All of the gas so gathered and processed in one of the plants, known as the Hansford Plant, is sold at the exhaust of the plant to Panhandle Eastern Pipe Line Company under a long term contract. Under such contract Phillips dedicated all of the gas produced from certain of its

leases to such contract and sale. All of the gas so gathered and processed in the other plant, known as the Sherman Plant, is sold at the exhaust of the plant to Michigan-Wisconsin Pipe Line Company under long term contracts. Under the latter contracts Phillips dedicated all of the gas produced from other of its leases and the gas so purchased to such contract and sale.

"The price presently in effect under the Panhandle Eastern contract is 4.5c per Mcf on a 16.4-pound pressure base, which is 4.03c per Mcf on a 14.65-pound puressure base. The average price presently in effect under the Michigan-Wisconsin contracts for Oklahoma gas is 7.59c per Mcf on a 14.65-pound pressure base plus possible accretions not yet established.

"The value of and the price that can be received for the liquid hydrocarbons recovered from the gas so processed are controlled by market conditions generally and what products of like kind and character are at the time selling for on the open market. As a result, such value and price vary from time to time.

"Likewise, the costs of gathering and processing the raw gas and of marketing the products, which must be taken into account in determining the value or price attributable to the gas at the wellhead before gathering and processing, fluctuate from time to time dependent upon many factors and conditions.

"Presently Phillips is receiving gross for the residue gas and liquid products recovered from gas processed in the Sherman Plant something more per Mcf of gas produced than the 9.8262c wellhead price herein proposed. The net proceeds, however, after allowance for costs of gathering, processing, marketing of products, taxes, without allowing any return on investment, are somewhat less than the proposed wellhead price. In the case of the Hansford Plant, the gross receipts per Mcf of gas produced, gathered and processed are substantially less than the proposed wellhead price.

"In spite of the fluctuating value of the liquid products

and changing costs, Phillips foresees no likelihood of a change that would substantially alter the foregoing relationship of gross or net returns to the proposed wellhead price.

"If, therefore, the Commission should grant the application herein and merely increase the 7c minimum wellhead price to the proposed 9.8262c price at the wellhead, without further provision as to the producer, gatherer and processor that does not sell at the wellhead, Phillips will be immediately confronted with a number of serious problems threatening substantially its entire investment and operations in the Guymon-Hugoton Field. They are:

"1. How can Phillips, in respect to its own produced gas, get an amount for the residue and the liquid products therefrom which, after deducting gathering and processing costs, taxes and a reasonable return on investment, will attribute to the raw gas the prescribed price at the wellhead, thereby permitting production thereof? It has no other market for its gas or products than that above stated. The liquid products are bringing gross the maximum obtainable therefor.

"2. If Phillips approaches Panhandle Eastern Pipe Line Company and Michigan-Wisconsin Pipe Line Company, telling them that it must get more for the residue gas in order to produce its wells, how is it or the residue purchasers to know how much must be paid therefor in order to comply with the Commission order? Must such price vary from day to day with the fluctuating costs of operation and varying returns from the liquids? Will the Commission and the residue purchasers at all times agree with Phillips' method of arriving at such costs and the returns from the liquids?

"3. How will the order affect the situation in respect to gas which Phillips as a gatherer purchases and for which it must pay the prescribed minimum wellhead price but for which it in turn has no market for the residue and liquid products that will result in anything but a loss from its gathering and processing operations? Is Phillips to be penalized for providing other producers with a market for their gas?

"4. In connection with its gathering and processing operations, some of the gas produced at the wellhead is used for fuel purposes or is lost through shrinkage at the plant. How can Phillips pay itself or get for such gas a price that will comply with the order when there has been no sale thereof in any form? The same question arises in respect to any use to which a producer may want to put its gas other than to make a sale thereof. How under the order is a producer to evaluate such use?

"5. Must Phillips abandon entirely its gathering and processing operations and seek a market for the raw gas at the wellhead?

"These are some of the questions which the Commission must, or at least should, take into consideration before it makes an order herein. Unless the Commission intends to arbitrarily and capriciously say that no gas shall be produced unless *sold* at the wellhead, then to be reasonable and realistic it must make an order providing a method or formula whereby the producer or gatherer that does not sell at the wellhead can determine what price is to be obtained elsewhere to comply with the order, or, in other words, how the producer is to know whether or not the price or the return so received elsewhere than at the wellhead is equivalent to the prescribed wellhead price. It is not enough to merely say that a certain price at the wellhead must be obtained. In respect to the present 7c price order, the Commission avoided such questions in respect to Phillips by its order declaring that Phillips was in compliance therewith. No such order is possible in respect to the proposed increased minimum price order, especially as applied to gas gathered and processed in the Hansford Plant. Nor can it be said that by merely paying royalty and taxes on the basis of the prescribed wellhead price, as was argued by the Commission in its brief in the appeals from the 7c price order, constitutes compliance, because to do so merely multiplies the producer's costs many times and if there is any merit in the theory that higher returns to the producer are necessary to prevent waste, such an increase in

costs without any increase in returns would be waste compounded.

"We ask the Commission to take into account the fact that properties, investments and matters with which the Commission is dealing involve many millions of dollars. As of now, after allowing for depreciation to date, Phillips has invested in the Hansford and Sherman Plants and the gathering systems serving those plants, in excess of 19 million dollars. Its investment in wells, leases and lease equipment in the field amounts to many millions of dollars more. The matter of developing or acquiring a market for gas is not simple. It is complex and has many ramifications requiring time, much negotiating, figuring and refiguring, as well as a large outlay of money. The Hugoton Field lay idle for many years after its discovery for want of a market at any price. Phillips, in good faith, set about to help find and develop the desired markets. The Commission should not now ignore all of the factors involved by a mere six-line order that on its own face purports to deal only with sales at the wellhead. Is there anything wrong with a producer gathering and selling the gas or gathering and processing the same and then selling the residue? It is being done and is a condition in the field. A suit is now pending in the courts involving the application of the present order to just such a situation. That's the case of the Panoma Corporation against the Natural Gas Pipeline Company of America. The Commission must take this condition into account.

"To conclude, Phillips Petroleum Company asserts that if the Commission determines that an order should be made increasing the minimum price, the Commission most assuredly should make such provision in its order as will reasonably protect a producer and gatherer such as Phillips."* (R. 281-290)

*In making this statement to the Commission, Mr. R. M. Williams read from a prepared statement. Because of the numerous errors appearing in the statement as transcribed in the Record, and in order that it may be more easily read by the Court, we have quoted from Mr. Williams' prepared statement rather than from the actual record.